FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

78-616

ROBERT MARKUS PETITIONER

v.

PHILIP ROSS
as Industrial Commissioner
of the State of New York

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

ROBERT MARKUS
350 CANAL ST
NEW YORK N.Y. 10013
pro se

OCTOBER 2, 1978

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The petitioner, Robert Markus, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York rendered July 13, 1978, and the decisions of the Unemployment Insurance Appeal Board set forth below.

DETERMINATIONS, OPINIONS, AND JUDGMENTS

The Court of Appeals decision to dismiss, sua sponte, rendered July 13, 1978.
The Appellate Division decision to deny reargument rendered May 18, 1978.
The Appellate Division decision to affirm the Unemployment Insurance Appeal Board decisions, rendered March 23, 1978.
A decision of the Unemployment Insurance Appeal Board dated January 25, 1977.
A decision of the Unemployment Insurance Appeal Board dated November 24, 1976.
The decision of the referee, dated August 9, 1976.
The determinations of Unemployment Insurance Local Office 511, dated May 13 and May 18, 1976.

JURISDICTION

This petition was filed less than 90 days from the date of the Court of Appeals decision. The jurisdiction of this court is invoked under rule 19 (b) of the rules of the court, 1970.

QUESTION PRESENTED

The question which arose in appeal of the determinations is:

Whether the discretionary power and duty of the Industrial Commissioner to determine who is an employer and who is an employee was being abused when the Referee and the Appeal Board and the New York State Appellate Division upheld the Local Office determinations without a hearing upon any proposition of the law upon which the determinations themselves must ultimately be based, thereby inflicting a penalty violative of the prohibition of attainder by the U.S. Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 9, U.S. Constitution:

"No bill of attainder or ex post facto law shall be passed"

STATEMENT OF FACTS

I. The Local Office.

1. The claimant wrote in his application and stated in his interview before an

eligibility examiner that he is "engaged in (any) activity that brings in or may bring in income."

2. The claimant, after several months of total unemployment, reported one day of "temporary, self employed" activity to a claims examiner, and on a form provided by the Local Office claimed partial unemployment for the week.

3. The claimant received a check from the Department of Labor for three/fourths of the ordinary amount for that week.

4. The claimant reported one day of "temporary, self employed" activity to a claims examiner, and on a form provided by the Local Office claimed partial unemployment for the week following 2,3. supra. He was interviewed by two claims examiners and told to sign a summary of interview statement by the second. He was told to leave his claims book with the claims examiner.

5. The claimant received a determination of ineligibility in the mail, retroactive to the date of application (1.supra), and extrapolating two years into the future.

6. The claimant contested the determination and asked the Local Office supervisor for a hearing; and also that the hearing be combined with another hearing which was to be held, at which the claimant's former employer, Harry Macklowe Inc. intended to prove that Robert Markus, the claimant, had not been its employee.

7. Claimant received an amended determination of ineligibility in the mail.

8. Claimant received notification that Harry Macklowe Inc. no longer contested the Department of Labor ruling that Robert Markus had been its employee.

II. The Hearing.

1. A hearing was held at which the referee questioned a representative of the Industrial Commissioner and the claimant. The representative stated that the basis for the determination of ineligibility was the final claims interview (4.supra). The claimant read from a prepared statement, copies of which were not accepted by the referee and the representative. The referee, to whom all remarks were addressed by both parties during the hearing, inter-

rupted that statement of precedent and question of law, to state

> "Please don't read anymore, because everything you're reading is damaging against you."

The claimant protested

> "I would like to disagree with you and go on if I may"

and was allowed to go ahead.

2. The claimant received by mail a copy of the referee's adverse decision.

NOTE: A copy of the referee's decision and copies of the determinations of the Local Office appear in appendix A.

III. The Appeal Board.

1. The appeal board was mailed a copy of the prepared statement (Hearing, II.1, supra) and a further notarized statement which concludes as follows

> "Since I did not change my activities between 12/1/75 and 5/12/76 it is the state's position regarding my activities which was changed. I attempted to raise questions regarding the state's interpretations of law at the hearing which were ignored in the decision of 8/9/76. I disagree that these questions are damaging to my claim, and a notarized brief which was refused at the hearing on 7/29/76 is included for consideration."

2. The appeal board upheld the referee and the Local Office.

3. The claimant asked the appeal board to reconsider its decision, with a request which began as follows

> "There has been an abuse of discretion in the lack of substantiation of fact by the state that my activity during the year 1975 was as an employer within the meaning of its statute, and since this is not merely an academic issue, I request the opportunity to present a new oral argument to the appeal board, and that the appeal board order reconsideration of its decision."

4. The claimant received a copy of the appeal board's revised and final decision.

NOTE: Copies of the appeal board decisions appear in appendix A.

IV. The Appellate Division.

1. Acting under a provision of the Labor Law which allows Appellate review of appeal board decisions, the claimant based an appeal to the Appellate Division upon the same question of law which had been raised at the hearing:

the definition of the term "employment" in sections 511.1, 522, and 591.1 of Article 18.

2.The state's response brief asserted that the matter of employment had been decided as one of fact, and was not subject to review except as to whether there was substantial evidence to support that fact. Then, citing law and precedent, the use of the term "employment" was limited to Section 522, in which it

> "means any employment including that not defined in this title"

3. The claimant made reply in an appellant reply brief that an abuse of discretion with respect to the lack of specific correlation of fact with statute existed, and that a decision adverse to the claimant would raise a substantial issue of law that the right of a claimant to collect benefits provided by law was abridged by a procedure avoiding both common law and reasonable discretion.

4. The Appellate Division found in favor of the Industrial Commissioner, without opinion.

5. The claimant requested the Appellate

Division grant permission to reargue, on the basis that the hearing was unfair, due process was denied, and there was no opportunity to challenge the Labor Department construction of the law.

6. The request was denied, without opinion.

NOTE: The decisions of the Appellate Division appear in appendix B.

V. The Court of Appeals.

1. Claimant applied to the Court of Appeals for review as of right,

> "the constitutional right of every free-lance hourly worker to a consistent,clear set of rules governing unemployment benefits"

Citing a new provision of New York statute, the application reiterated the question of the limit of discretion:

> CPLR 5501.9, McKinney, 1978ed.
> An exercise of "discretion" is ordinarily in the fact realm and beyond the powers of the Court of Appeals to review. But if the exercise of this discretion is beyond all permissible borders as perceived by the Court of Appeals, it qualifies as an "abuse of discretion" which is a reviewable question of law. It is in that situation that one finds the Court of Appeals from time to time

addressing itself to "discretionary" points"

2. The Clerk of the Court indicated a possible sua sponte rejection.

> "From the papers submitted it does not appear that constitutional questions were presented to or necessarily decided by the Court below"

The Clerk invited jurisdictional comments.

3. The claimant requested clarification of the Clerk's remarks, in view of the opinion of the learned Justice Louis Brandeis that

> "in every case involving a statute, the state courts must perform (aside from the consideration of any constitutional questions) two functions essentially different. First the court must construe the statute; that is, determine its meaning and scope. Then it must apply the statute, as so construed, to the facts of the case." Dahnke-Walker Milling Co. v. Bondurant 257 U.S.282.

and that

> "The validity of an authority is not drawn in question where the controversy is confined to determining whether the facts upon which a person can exercise that authority do or do not exist."(ibid.)

but that an abuse of discretion is an abuse of authority.

4. The claimant submitted jurisdictional

comments to the court.

5. The court dismissed the appeal sua sponte.

NOTE: The decision of the Court of Appeals appears in appendix C.

REASONS FOR GRANTING THE WRIT

This is a question which is being brought before the Supreme Court of the United States as demonstrably special and important, involving a principle which is the thesis of our federal polity. That central principle is the separation of power into legislative, executive, and judicial authority, the abuse of which may be defined as attainder. The question has arisen out of a dispute between a claimant and the Commissioner of the Department of Labor of the State of New York, over the eligibility for unemployment insurance benefits. The Unemployment Insurance Act, otherwise known as the New York State Labor Law, Article 18, created a program of social welfare, now funded by state and federal taxes, providing compensation in the event of total unemployment.

All recipients of unemployment insurance compensation in the United States have a "property" interest in the benefits which is protected by the U.S. Constitution (Steinberg v. Fusari, 415 U.S. 912). Yet, this case differs from Steinberg v. Fusari and all the unemployment insurance eligibility cases already heard by federal courts, in one qualitative respect. In those cases, the unemployment insurance hearing and appeal procedures served to arbitrate between an alleged "aggrieved employer" and an alleged "aggrieved employee". In this case the adversaries are an alleged "self-employed person" and the Department of Labor. In this case the Department of Labor spontaneously alleged and "determined" ineligibility upon its own authority and without reference to precedent or law, or for that matter a thorough investigation, viewing only the facts at hand. The hearing served only to review the sufficiency of the facts at hand to support the conclusion. The attorney for the industrial commissioner was representing the claims examiner who made the determinations and the authority of the Department of Labor to make "rules or orders"(re. which see column A, following).

Matter of Electrolux Corp. 286 N.Y. 390	Cummings v. Missouri 71 U.S. 277
"In the same subdivision of section 523 in which the duty to determine the amount of the contribution due from an employer is imposed upon the Commissioner the statute provides for an appeal from "any other rule or order of the Commissioner under any provision of this Article". By clear implication the statute confers upon the Commissioner authority to make other rules or orders appropriate to the performance of the duties imposed by any provision of the statute. A grant of power to an administrative officer may not be read into a statute by doubtful implication, but the statute here confers upon the Commissioner by necessary implication both power and duty to determine the persons who are employers and the persons who are employees within the meaning of the statute, in order that the amount of contributions due from an employer may be fixed, and the statute does not restrict the discretion of the Commissioner in respect to how or	"A bill of attainder is a legislative act which inflicts punishment without judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties. In these the legislative body, in addition to its legitimate functions exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of

when a rule or order shall be made determining a controversy in that field."

New York Labor Law: Art.18
622.2
Evidence and Procedure

"At a hearing held as herein provided, evidence may be offered to support a determination, rule, or order, or to prove that it is incorrect. The appeal board and the referees, in hearings and appeals under any provision of this article, shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties."

The New York Legislature has given the chief executive of the Department of Labor power to make rules or orders appropriate to the performance of his duties, and an unrestricted discretion with regard to determining a controversy in that same field. The Legislature has given the power of hearing an appeal of a determination to officers who are to consider proof; nowhere are they given the

authority to consider the question of the basis of a determination in law. In effect, the authority to construe and enforce the law as written rests with the executive discretion of the Commissioner and his administrative representatives. But the Supreme Court has decided that the legislative exercise of such authority is in violation of the U.S. Constitution, Art.1, sec.9, and the legislative assignment of judicial authority to an administrator of its law is no less a violation of the Constitution. That the courts of New York do not review discretionary constructions is due to an unfortunate set of precedents which make all decisions which have been through the Department of Labor appeal procedure to review "total unemployment" appear as fact, which, the Industrial Commissioner argues, is sufficient as proof unless there is substantial evidence to the contrary. The courts, as recent authority continues to point out, are rarely disposed to review the record to find a question of law which has not been certified.

I am cognizant of the various uses of the discretionary power in and out of government, as well as the discretionary applications of

"due process" itself. Moreover, I am aware of the reasons why the Constitution was ordained and established in 1787, and of the abuses which the free persons of the thirteen states would thereby not be required to endure. I recognize that the intent of the founding fathers is to place the proscription of attainder under the aegis of the judiciary: ergo, ArtIII sec.3. And since I find that my power to argue a question of law and precedent of the occasional worker, known commonly as "free-lance", and his ability to obtain unemployment benefits during periods of temporary but nonetheless total unemployment (see Bunzl v. Lubin, New York 1955 1AD2d46) has been peremptorily preempted by the Industrial Commissioner, who obtains his absolute and unquestioned authority to construe the law and impose penalties by "necessary implication" from the legislature, I, acting in my own behalf, present this request for a ruling upon the constitutional question set forth above.

I would argue, with the permission of the Court, that there is a limit to the exercise of discretion by an administrator, a limit visible from the point of a recognized pale

of judicial authority, and that it is in the common interest to resolve the question before the court at this time.

CONCLUSION

If the Court has found any justification for the argument that Article I Section 9 of the Constitution has been correctly brought out as paramount in this case, I respectfully request the Court to issue a writ of certiorari to review the judgment of the New York Court of Appeals and the decision of the Unemployment Insurance Appeal Board.

Respectfully submitted,

Robert Markus

Robert Markus, petitioner
350 Canal St
New York N.Y. 10013

October 2, 1978